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No. 00-9285 (10)

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

WALTER MICKENS, JR.,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION OF LEGAL ETHICISTS AND THE STEIN CENTER FOR LAW AND ETHICS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37.3(b), movants Kathleen Clark, Deborah Coleman, Earl C. Dudley, Jr., Monroe Freedman, Stephen Gillers, Bruce Green, Donald Hilliker, David B. Isbell, John M. Levy, Margaret Love, Steven Lubet, Susan Martyn, James Moliterno, Deborah Rhode, Ronald Rotunda, George Rutherglen, Theodore J. Schneyer, Charles W. Wolfram and Fordham University's Louis Stein Center for Law and Ethics respectfully request leave to file the attached brief *amicus curiae* in support of petitioner. Movants have sought consent for their appearance as *amici curiae* from Petitioner Walter Mickens, Jr. and Respondent John Taylor, Warden of the Sussex I State Prison. Petitioner has consented, but Respondent has not.

Movants are fourteen law professors who are experts in legal ethics, four legal practitioners who are or have served as chairs of the ABA Standing Committee on Ethics and Professional Responsibility, and a university ethics center. Kathleen Clark, Professor at Washington University School of Law, has taught legal ethics since 1993. Deborah Coleman, Partner at Hahn Loeser & Parks, is a former chair of the ABA Standing Committee on Ethics and Professional Responsibility. Earl C. Dudley, Jr., Professor at University of Virginia School of Law, is a member of the Virginia State Bar Committee on Professionalism. Monroe Freedman, Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University Law School, has taught legal ethics since 1966 and is the author of UNDERSTANDING LAWYERS' ETHICS (1998). Stephen Gillers, Professor at New York University School of Law, has taught legal ethics since 1978, and is the author of a casebook, REGULATION OF LAWYERS (5th ed. 1998). Bruce Green, Stein Professor at Fordham University School of Law and Director of the Louis Stein Center for Ethics, has taught legal ethics since 1987. Donald Hilliker, Partner at McDermott Will & Emery is the present chair of the ABA Standing Committee on Ethics and Professional Responsibility. David B. Isbell, Senior Counsel at Covington & Burling, is a former chair of the ABA Standing Committee on Ethics and Professional Responsibility and teaches professional responsibility at Georgetown University Law Center. John M. Levy, Professor at the Marshall-

Wythe School of Law at the College of William and Mary and Director of the Graduate Program in the American Legal System, has taught legal ethics since 1976 and is author of ETHICS OF THE LAWYER'S WORK (1993). Margaret Love, Of Counsel at Brand & Frulla, is a former chair of the ABA Standing Committee on Ethics and Professional Responsibility. Steven Lubet, Professor of Law at Northwestern University and Director of Northwestern's Program on Advocacy and Professionalism, has taught ethics since 1984 and is coauthor of the course book EXERCISES AND PROBLEMS IN PROFESSIONAL RESPONSIBILITY (2d ed. 2001) and coauthor of the treatise JUDICIAL CONDUCT AND ETHICS (3d ed. 2000). Susan Martyn, Professor at University of Toledo College of Law, has taught legal ethics since 1977. James Moliterno, Professor at the Marshall-Wythe School of Law at the College of William and Mary and Director of its Center for the Teaching of Legal Ethics, has taught legal ethics since 1984, and is author of CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS (1999) and ETHICS OF THE LAWYER'S WORK (1993). Deborah Rhode, Ernest W. McFarland Professor at Stanford Law School and Director of the Keck Center on Legal Ethics and the Legal Profession, has taught legal ethics since 1979, and is author of the casebook, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998) and co-author of the casebook, LEGAL ETHICS (2d ed. 1995). Ronald Rotunda, Albert E. Jenner Jr. Professor at University of Illinois School of Law, has taught legal ethics since 1974, and is co-author of the casebook, PROFESSIONAL RESPONSIBILITY (7th ed. 2000). George Rutherglen, O.M. Vicars Professor of Law at the University of Virginia School of Law, is the Director of Graduate Program for Judges. Theodore J. Schneyer, Milton O. Riepe Professor of Law at the University of Arizona James E. Rogers College of Law, is the author of THE LAWYER IN MODERN SOCIETY (2d ed. 1976). Charles W. Wolfram, Charles Frank Reavis Sr. Professor Emeritus at Cornell Law School, has taught legal ethics since 1974, is the author of the treatise, MODERN LEGAL ETHICS (1986), and was the Chief Reporter for the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (American Law Institute

1999). The Louis Stein Center for Law and Ethics, based at Fordham University School of Law, sponsors programs, develops publications, supports scholarship on contemporary issues of law and ethics, and encourages professional and public institutions to integrate moral perspectives into their work. Over the past decade, the Stein Center and affiliated Fordham Law faculty have examined the ethical dimensions of the administration of criminal justice, including issues of conflicts of interest.

The potential *Amici* have an interest in ensuring that this Court recognize the fundamental and critical importance of the duty of loyalty to the lawyer-client relationship and the fair and impartial administration of justice in the adversarial system.

Amici focus on four issues that support Mickens' Brief. First, the historical and universal importance of the duty of loyalty in shaping the ethical duties of counsel in the United States. Second, the nature of conflicts of interest and the appropriate analysis for determining when a conflict of interest exists. Third, the practical and philosophical error in importing an adverse effect test into the Court's Sixth Amendment analysis in the circumstances of this case. Fourth, and finally, the fundamental analytical error in the Fourth Circuit's adverse impact analysis, given the nature and effect of conflicts of interest.

Based upon the above, movants respectfully request that the Court accept their attached brief for filing.

Respectfully submitted,

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INTEREST OF *AMICI*[1]

The interest of *Amici* is set forth in the accompanying motion for leave to file this brief *amicus curiae*.

SUMMARY OF ARGUMENT

It is the view of *amici* that a conflict exists when counsel has other interests that pose a substantial risk of materially and adversely affecting the representation of the client. In the present case, no matter by what standard Saunders' representation of Mickens is judged, (1) Saunders was laboring under a conflict of interest that must be cognizable under this Court's Sixth Amendment ineffective assistance standard; (2) this conflict was unwaiveable; and (3) under the circumstances here, as a matter of legal ethics and Sixth Amendment jurisprudence, Mickens should not be obliged to demonstrate any "adverse" effect. It is further *amici's* view that the *en banc* majority's conclusion that Mickens failed to prove the necessary adverse affect demonstrates why that burden, if placed on defendants whose counsel labors under a conflict of interest, will result in many defendants receiving unremedied ineffective assistance of counsel. In any event, the adverse effect on Mickens in this case was profound and requires a new trial.

ARGUMENT

> No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.
>
> — *Luke* 16:13 (King James).

As one of the oldest statements forbidding a conflict of interest, the most important aspect of the above Biblical passage is that it is neither cautionary nor aspirational — it is a simple prohibition. *Amici* consider that the wisdom of this ancient dictum has informed the profession's long-standing

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1. *Amici curiae* state, pursuant to Sup. Ct. R. 37.6, that this brief was not authored in any part by counsel for any party, and that no person or entity made any monetary contributions to its preparation or submission.

adherance to the principle of client loyalty and should inform this Court's deliberation of this important case.

* * *

To execute a man who was represented at his trial and first appeal by a lawyer who did not disclose that he represented the victim up until his death is the very antithesis of our system's commitment that a person facing loss of money or freedom, let alone life, is guaranteed his very own champion. To allow the execution to occur when the trial judge was on notice of the conflict, compounds the betrayal; the defendant then has been denied not only the loyalty of his lawyer, but also the guardianship of the court. But perhaps of even greater significance to *amici* — indeed, what has brought *amici* together to present this brief — is the concern that to permit Mickens' execution, on these facts, would undermine public confidence in the fairness of the judicial system.

What is the public to think when it learns that a man has been executed after being represented by a lawyer who, in effect, switched sides, that the lawyer did so with the imprimatur of the courts, but without telling his client, and that when this unethical and unseemly conduct came to light, the client was told it is he who must prove how this profound conflict affected his lawyer's performance? Surely the public will conclude that this defendant has been betrayed not once, but twice, first when this lawyer was assigned and second when he, the injured client, was saddled with the onerous burden of proving adverse effect. But the public will also conclude that the system has been betrayed in a way that undermines confidence not just in the result in this case, but in all future cases.

As this Court recognized in *Wheat v. United States*, 486 U.S. 153 (1988), the "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* at 160. The public expects, as it should, that when an accused is brought before a court the accused has the undivided loyalty of counsel. Anything less than guardianship by the courts for loyalty of counsel undermines not only the lawyer-client relationship, but also public support for the justice system.

I. BECAUSE OF THE FUNDAMENTAL NATURE OF A LAWYER'S DUTY OF LOYALTY, CONFLICTS OF INTEREST ARE DIFFERENT BOTH IN DEGREE AND IN KIND FROM OTHER ETHICAL AND REPRESENTATIONAL FAILURES.

A. A Lawyer's Loyalty to his Client Has Always Been his *First* Duty – from the Very Beginning of the Legal Profession through its Universal Application Today.

Recognition of the importance of lawyer loyalty has been eloquently expressed for centuries. In 1820, in one of its most famous articulations, Lord Brougham described the obligation to serve the client:

> [A]n advocate, by the sacred duty which he owes his client, knows . . . [t]o save that client, by all expedient means, to protect that client, at all hazards and cost to all others . . . .

HENRY LORD BROUGHAM, SPEECHES OF HENRY LORD BROUGHAM 63 (1841), *quoted in* Steven H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227, 228 n.18 (1987). In 1824, Chief Justice Story delineated the terms of the duty of loyalty owed by a lawyer to his client:

> I agree to the doctrine urged at the bar, as to the delicacy of the relation of client and attorney, and the duty of a full, frank, and free disclosure by the latter of every circumstance, which may be presumed to be material, not merely to the interests, but to the fair exercise of the judgment, of the client. An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel. When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no

> engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity.

Williams v. Reed, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824).

This Court recognized early on that courts were obliged to monitor the behavior of the lawyers before them to ensure that the lawyer's duty of loyalty was fulfilled:

> There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

Stockton v. Ford, 52 U.S. 232, 247 (Dec. Term, 1850).

Every state bar has an ethical rule prohibiting a lawyer from undertaking a representation that involves a conflict of interest. *See* NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, Vols. I – IV, *generally* (University Publ'ns of Am. 2001)(reprinting the codes of professional responsibility for all fifty states). Most of these rules are derived from, or literally copied from the ABA Code of Professional Responsibility or the ABA Model Rules of Professional Conduct. While ethics codes vary in their particulars from jurisdiction to jurisdiction, they all condemn Saunders' conduct here.

B. CONFLICTS OF INTEREST ARE DIFFERENT IN DEGREE *AND* IN KIND FROM OTHER ETHICAL VIOLATIONS AND FAILURES IN REPRESENTATION.

Conflicts of interest infect the lawyer-client relationship in subtle ways, leaving the entire representation suspect. As this Court has recognized, a legal representation "contains a

myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are part of the record." *Young v. United States*, 481 U.S. 787, 812-13 (1987) (discussing the effect of a non-disinterested prosecutor). Unlike other ethical or representational failures, which are discrete and whose effects are manifest and readily measured, a conflict of interest casts a shadow over every aspect of the lawyer-client relationship.

A breach of the duty of loyalty is worse than other ethical breaches because it is a breach of the most fundamental duty owed to a client. It is also a substantively different type of breach because it affects invisibly every decision in the representation. Depending on the conflict and the representation, this breach can blunt a lawyer's advocacy, undermine a lawyer's independent professional judgment, and inhibit a lawyer's creativity and zeal. A suspect representation, which could have failed in so many places and at so many levels, produces a verdict that has not been adequately tested by the adversarial process and, thus, cannot be trusted.

While unrevealed conflicts always cast these shadows on the representation, the problem is particularly acute in criminal representations, especially capital cases. There is no way to recreate what might have, could have, or should have happened if the accused were represented by a lawyer with undivided loyalty. The defense of capital cases is an art, not a science. Each case is literally unique. The decision-tree from retainer to final appeal includes hundreds of branches — dead ends, false starts and choices, ranging from the minor — do I ask one more question on cross-examination? — to the major — should the client defend on self-defense or insanity? As a result, when confronted with a case involving a conflict of interest violation this Court must be particularly sensitive to the harm the client suffered and to the damage to the system of justice any failure to remediate the ethical lapse will cause.

II. UNDER ANY ANALYSIS, SAUNDERS' CONFLICT OF INTEREST SHOULD BE COGNIZABLE UNDER THE SIXTH AMENDMENT.

A. Sixth Amendment Jurisprudence is Hamstrung Because it Lacks a Clear and Easily Applied Definition of Conflict.

The Sixth Amendment case law addressing when conflicts of interest are constitutionally cognizable often attempts to distinguish (or seems to) between conflicts that are "actual" or "real", and those that are "potential" or "technical." It is the view of *amici* that such distinctions are not really helpful, are not found in the rules governing the legal profession and should be set aside in favor of an approach squarely based on the rules of professional conduct. These rules merely inquire whether a conflict of interest exists. If it does, they bar the representation.

The various opinions in this case alone reveal a bewildering number of competing concepts: conflict of interest; actual conflict; technical conflict; potential conflict; apparent conflict; genuine conflict; actually representing conflicting interests; possible conflict; a conflict that never ripened into an actual conflict; a conflict of interest that actually affected the adequacy of representation; a client actually saddled with a genuine conflict; and, finally, a conflict of interest that actually existed. And an analysis of other case law demonstrates that these various formulations are anything but aberrational.[2]

2. Numerous trial and appellate courts have stumbled over claims of ineffective representation based on conflicts of interest because the courts lack a clear and useful definition for a conflict. *See, e.g., (in order of Courts of Appeal), United States v. Sotomayor-Vazquez,* 249 F.3d 1, 15 (1st Cir. 2001) ("To show an actual conflict of interest, the defendant must show that 'the lawyer could have pursued a plausible alternative defense strategy or tactic' and that 'the alternative strategy or tactic was inherently in conflict with or not undertaken due to the attorney's other interests or loyalties.'"); *Amiel v. United States,* 209 F.3d 195, 198 (2d Cir. 2000) (holding that an actual conflict occurs when a lawyer and client's interest "diverge with respect to a material factual or legal issue or to a course of action"); *Hess v. Mazurkiewicz,* 135 F.3d 905, 910 (3d Cir. 1998) (same); *Perillo v. Johnson,* 205 F.3d 775, 801-02 (5th Cir. 2000) (holding that an actual conflict occurs when a lawyer places himself in a situation "inherently conducive to divided loyalties," and claimant shows "something more"); *United States v. Hall,* 200 F.3d 962, 965-66 (6th Cir. 2000) (holding that the Court will not find an actual conflict unless claimants "can point to 'specific instances in the record to suggest an actual conflict or impairment of their interests'"); *Stoia v. United States,* 22 F.3d 766, 771 (7th Cir. 1994) ("An actual conflict of interest results if the defense attorney was required to make a choice advancing his own interests to the detriment of his client's interests."); *Nave v. Delo,* 62 F.3d 1024, 1034 (8th Cir. 1995) (holding that the claimant must show "that his counsel actively represented conflicting interests"); *United States v. Hearst,* 638 F.2d 1190, 1194 (9th Cir. 1980) (holding that an actual conflict is one that adversely affects the defense lawyer's performance); *United States v. Migliaccio,* 34 F.3d 1517, 1526 (10th Cir. 1994) ("Defense counsel's performance [is] adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests."); *Reynolds v. Chapman,* No. 00-12207, 2001 U.S. App. LEXIS 13493, at *15 (11th Cir. June 15, 2001) (holding that a claimant must show "inconsistent interests" and show that his counsel "acted in some way that reflected the reality of these conflicting interests."); *United States v. Taylor,* 139 F.3d 924, 930 (D.C. Cir. 1998) (holding that "the defendant's burden is to show that counsel actually acted in a manner that adversely affected his representation by doing something, or refraining from doing something, that a non-conflicted counsel would not have done"); *People v. McDonald,* 496 N.E.2d 844, 847 (N.Y. 1986) (holding that an actual conflict is one that bears a "substantial relation" to the defense).

These competing concepts obscure and confuse what should be a straightforward approach to determining whether conflicts of interest cognizable under the Sixth Amendment are present in any given case. *Amici* submit that the approach they suggest below will eliminate the underlying confusion and clarify the standard for finding a conflict.

B. The Well Established Ethical Standard for Conflicts of Interest Should Be Applied in These Cases.

In the view of *amici,* an analysis of this case should spring from the universal and longstanding ethical rules of the profession, rules that this court has recognized many times in the past to inform itself of the proper standards it should adopt in the Sixth Amendment context. *See, e.g., Swidler & Berlin v. United States,* 524 U.S. 399, 406-07 (1998); *Wheat,* 486 U.S. at 160; *Nix v. Whiteside,* 475 U.S. 157, 165-66 (1986); *Cuyler v.*

Sullivan, 446 U.S. 335, 346 (1980); *see also Michigan v. Harvey*, 494 U.S. 344, 367 n.12 (1990) (Stevens, J. dissenting).

It is noteworthy that in none of the generally accepted ethical formulations — the Model Code, the Model Rules, the Restatement (Third) of Law Governing Lawyers — do the words "actual", "potential", "real" or "technical" appear. It is also noteworthy that none requires proof of an actual adverse effect. Rather, each reflects an obligation to identify the lawyer's diverging interests: The Model Code refers to the lawyer's "own financial, business, property, or personal" and "differing interests." MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(A), 5-105(A) (1983) [hereinafter "MODEL CODE"]. The Model Rules refer to "responsibilities to another client or to a third person, or by the lawyer's own interests." MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2001) [hereinafter "MODEL RULES"]. The Restatement refers to a "lawyer's own interests" or "the lawyer's duties to another current client, a former client, or a third person." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 121 (American Law Institute 1999) [hereinafter "RLGL"].

But finding differing interests between lawyer and client, while necessary to finding a conflict of interest, is not in itself sufficient. These formulations also include terms of limitation designed to assure that an ethically cognizable conflict is not a trivial or immaterial matter. In the Model Code, the terms of limitation are that "the exercise of" the lawyer's "professional judgment will be or reasonably may be affected" by these other interests, *see* MODEL CODE DR 5-101(A); alternatively the exercise of professional judgment "will be or is likely to be adversely affected" by the proffered employment "or it would likely involve him in representing" differing interests. *See* MODEL CODE DR 5-105(A). In the Model Rules, the standard is whether the representation "may be materially limited." MODEL RULE 1.7(b). Finally, the Restatement captures — and, in the view of *amici*, captures best — these terms of limitation when it refers to the existence of "a substantial risk that the lawyer's representation of the client would be materially and adversely affected" by the other interests or duties. *See* RLGL, § 121.

Significantly, the analysis under the generally accepted legal ethics conception does not require an "adverse" effect on the representation. Rather, the analysis focuses on the *risk of materially divergent interests* and the *risk* of an adverse effect. "In the modern view, a conflict of interest exists whenever the attorney-client relationship or the quality of the representation is 'at risk,' *even if no substantive impropriety — such as a breach of confidentiality or less than zealous representation — in fact eventuates.* The law of lawyering then proceeds by assessing the risk and providing an appropriate response." GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 10.4, at 10-11 (3d ed. 2001) (citations omitted). This provides courts with an objective test to determine whether a lawyer is burdened with a conflict. That test is reflected in the following question: did the lawyer have *other interests* that posed a *substantial risk* of *materially and adversely* affecting the representation? Applying this standard to Mickens' representation by Saunders we can recognize the conflicts of interest with little difficulty.

C. SAUNDERS WAS BURDENED WITH MULTIPLE DIVERGENT INTERESTS THAT PRESENTED A SUBSTANTIAL RISK OF MATERIALLY AND ADVERSELY AFFECTING MICKENS'S REPRESENTATION.

1. SAUNDERS WAS SUBJECT TO MULTIPLE DIVERGENT INTERESTS.

This case involves not one, but several divergent interests. These divergent interests can be divided into two categories: those that involved Saunders' other client, Hall, and those that were simply personal to Saunders.

Saunders owed two related but separate duties to Hall: a duty to keep his confidences and a more pervasive duty of loyalty. The codes of ethics are uniform in providing that a lawyer's duty to keep confidences continues after the lawyer-client relationship is terminated. Indeed, the lawyer's duty to protect his client's confidences survives even the client's death. *Swidler & Berlin*, 524 U.S. at 410-11. The district court below identified four confidences from Hall, each of which Saunders

was bound not to reveal under the applicable provision of the Virginia Code Professional Responsibility DR 4-101.[3] *See Mickens v. Greene*, 74 F. Supp. 2d 586, 599, 606 (E.D. Va. 1999) (citing transcript of Saunders' deposition taken on December 23, 1998).

Saunders also owed Hall a duty of loyalty. This duty is reflected in the professional rules that provide that a lawyer may not take on a representation (in this case Mickens) that may be materially limited by the lawyer's duties to others (in this case Hall) or to himself. Given that Sanders represented Hall at the very date of his death, this material limitation becomes likely. Its likelihood is increased by the fact that the character and conduct of the victim were clearly at issue — a condition that is present in every capital case because of the free range of inquiry at the penalty phase of the proceeding and that was particularly pertinent here because of the circumstances of this crime.

Saunders also labored under at least two *personal* divergent interests: a pecuniary interest in the representation and an interest in escaping disciplinary proceedings. When he was offered the opportunity to take on this matter Saunders said nothing to the Court about his role as a defense counsel to Hall on charges that had been dropped the prior Friday and, once his silence failed to prevent the Court from making an appointment the Court knew or should have known was suffused with a conflict of interest, Saunders needed to maintain silence in order to keep it.

While almost all lawyers have a pecuniary interest in their clients — lawyers must make a living — Saunders' interest in the Mickens representation moved beyond the ordinary. This

3. These were: (a) Hall had been charged with carrying a concealed weapon at the intersection of 27th Street and Marshall in Newport News; (b) Hall's mother had pressed charges against him for assault; (c) Hall was not living with his mother at the time of his death; (d) Saunders had discussed with Hall "the circumstances surrounding each of the charged crimes." In addition, the very existence of juvenile charges against Hall was confidential since in Virginia juvenile court records are sealed absent a court order. *See* VA. CODE ANN § 16.1-305 (Michie 1992); *Mickens*, 74 F. Supp. 2d at 600.

was a high-profile capital representation that, unlike the juvenile court representations with which Saunders had apparently been supporting himself, had the advantages of enhancing his prestige and visibility. It also paid a higher hourly rate and imposed no fee cap on the total amount he could charge. *See* VIRGINIA CODE ANN. § 19.2-163 (Michie 1992).

This interest was only exacerbated by Saunders' other personal interest: to avoid professional discipline. Once Saunders undertook Mickens' representation he had violated the Virginia Code of Professional Responsibility in at least three respects. First, he had not been candid with the tribunal about the representation of Hall. *See* VIRGINIA CODE OF PROF'L RESPONSIBILITY DR 7-102(A) (Michie 1992). Second, he had failed to disclose the prior representation to his new client, Mickens. *See id.* EC 7-8, EC 5-19. Third, he had undertaken a conflicting representation on an undisclosed basis. *See id.* DR 5-105(C); *see also Dowell v. Commonwealth*, 351 S.E.2d 915, 917-18 (Va. Ct. App. 1987). It is all these obvious and serious divergent interests that serve as a predicate for the next part of the analysis.

2. SAUNDERS' DIVERGENT INTERESTS WERE MATERIAL AND ADVERSE, AND POSED A SUBSTANTIAL RISK TO MICKENS' REPRESENTATION.

If any of Saunders' divergent interests, either separately or cumulatively, were material, adverse and caused a substantial risk to Mickens' representation, then Saunders labored under conflict. To be "material", the interest must pose a risk to one of a lawyer's duties to his current client (i.e. Mickens); to be "adverse", the interest must pose a risk that it will create an incentive for the lawyer to do something not in his client's best interest. *See* RLGL § 121 cmt. c(i & ii). A "substantial risk" has been defined by the case law as a risk that is *significant* and *plausible*, even if it were not certain or even probable that injury will occur. *See* RLGL § 121 cmt. c(iii). Thus, Saunders' divergent interests burdened him with a conflict if any or all of those interests diverged from Mickens' on any aspect of the case, and thereby posed a significant and plausible risk to the representation.

While it is thus critical to evaluate the divergent interests against these three standards, "material," "adverse" and "substantial risk," it is unnecessary, and, in fact, unhelpful, to rely on the record of trial to determine these issues. Rather, the ethical rules examine these questions prospectively, which is how this Court should examine them — from the point where the interests began to diverge.[4]

The existence of a conflict here can be illustrated by evaluating Saunders' duty to examine and investigate the nature and circumstances of the crime thoroughly in order to determine the best lines of defense.[5] Each of Saunders' divergent interests — his duty of confidentiality and loyalty to Hall, his pecuniary interest in the representation, and his interest in avoiding disciplinary proceedings — created the same incentive: to avoid investigating Hall at all. This fundamentally sabotaged Saunders' pre-trial preparation because he was compelled to make judgments based not on objective and dispassionate strategy but, instead, upon considering his own situation and concerns — forces with which an unconflicted lawyer would not be saddled.

First, Saunders was barred from revealing any confidential information regarding Hall. This crippled Saunders' pre-trial investigation from its inception and was clearly not in Mickens' best interest. Any and all facts regarding the crime must be gathered, even if they are rendered unimportant and the approaches they suggest are discarded in favor of better strategies later. A lawyer cannot make the best choice if he systematically ignores crucial information. By itself, Saunders'

4. In fact, reliance on the record of the trial to determine that the interests were material, adverse and posed a substantial risk to the relationship will twist the analysis and systematically cause courts to underestimate the negative effect of these interests because the sins of conflict are sins of omission that leave a record bereft of evidence. *See infra* at pp. 18-21.

5. "Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." ABA STANDARDS OF CRIMINAL JUSTICE § 4-4-1(a) (1993). This is not to say that Saunders' divergent interests did not affect his other duties to Mickens, but the corruption of one material duty demonstrates that Saunders operated under a conflict of interest.

duty to keep Hall's secrets posed a plausible, significant risk to Saunders' ability to perform an adequate pre-trial investigation, thereby creating a conflict.

Second, Saunders' duty of loyalty to Hall affected his ability to advocate zealously for Mickens. While the multiple ways that loyalty interest affected the representation might be harder to pinpoint, several courts that have examined a case where the lawyer for the defendant also represented the victim have expressed the appropriate level of concern about the conflicts of interest thus presented. *See Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974); *United States ex rel. Miller v. Myers*, 253 F. Supp. 55, 57 (E.D. Pa. 1966); *People v. McDonald*, 496 N.E.2d 844 (N.Y. 1986); *State v. Aguilar*, 536 P.2d 263 (N.M. Ct. App. 1975).

That the Courts respond this way is not surprising because it is difficult to imagine Saunders' loyalty to Hall as not having a profound effect on Mickens' representation. Saunders is appointed to represent Hall on serious charges. If Saunders is like any other lawyer, he immediately prepares to defend Hall, learning the facts of the case, meeting with the client, assessing the charges, preparing to advocate on his behalf. Saunders then knew Hall not as a docket number and a mug shot, but as an individual reposing his trust in Saunders to act in his best interests, defending him against the charges, learning Hall's version of the events in conversations cloaked with confidentiality.

Suddenly Hall was the victim of a brutal homicide whose alleged perpetrator, Mickens, Saunders is defending against the charges of murder. Now Saunders is obliged to investigate all the disparaging, humiliating, and potentially criminal behavior of Hall from the time when Hall was still his client. And he must do so against the backdrop of whatever feelings of sadness, anger and retribution Saunders — no matter how diffident he now seems — then feels about his client's tragic death, as well as against whatever commitment of loyalty, no matter how subconscious, Saunders still has toward the deceased. While no one will ever know — perhaps not even

Saunders — what effect all that had, it is hard to conceive it did not have a significant effect on Saunders' representation of Mickens.

Third, Saunders' pecuniary and reputational interests only reinforced the incentives created by his conflicting duties to Hall. Even if Saunders did not recognize his obligations to Hall as a former client, he certainly recognized his own self-interest in keeping the prior representation of Hall a secret — a fact that would be revealed as soon as Saunders attempted to conduct any of the investigation of the victim, especially any investigation of Hall's family and associates, the very people who would have known of the prior conflicting representation.

The need to conduct a complete pre-trial factual investigation, the serious consideration necessary to decide whether to place the victim's conduct at issue in the guilt phase, and the absolute requirement of lessening sympathy for the victim in the penalty phase yielded a high risk, even a certainty, that the representation would be adversely affected. And it turned out that Saunders failed to undertake the investigation of or address Hall's conduct or character in any aspect of the trial — omissions so glaring that their only explanation was Saunders' recognition of the conflict. And since the effect of those divergent interests — maintaining silence; doing no investigation; not trying the victim or even diminishing sympathy for him — was the same as that created by Saunders' other conflicts of interest, by definition these personal interests, created a significant risk of an adverse effect on the representation of Mickens that unfortunately was realized as the representation unfolded.

3. The *En Banc* Opinion Analysis of the Effect of Saunders' Divided Interests Is Fundamentally Flawed.

In rejecting the idea that Saunders' divergent interests could play any role in Mickens' defense, the Court of Appeals majority opinion relied on the testimony of Saunders dismissing such concerns. While Saunders might have believed his allegiance to Hall "ended when [he] walked into the court-

room and they told [him], [Hall] was dead and the case was gone," *see Mickens*, 74 F. Supp. 2d at 605, Saunders' bald assertion to that effect cannot overcome a charge of subconscious bias. *See In re Williams*, 309 N.E.2d 579, 581 (Ill. 1974); *see also Swidler & Berlin*, 524 U.S. at 410-11; *People v. Thomas*, 545 N.E.2d 654 (Ill. 1989); San Diego Cty. Bar Ass'n Ethics Comm., Op. 1993-2 (1994) (holding that a law firm cannot represent a man accused of murdering a former (obviously dead) client).

Furthermore, Saunders' assertion that he believed there was no conflict is belied by his concealment of his relationship to Hall. If Saunders did not believe he owed any duties — including a duty to keep confidences — to Hall, why did he not disclose to his client, his co-counsel, or the court that up until his former client's unfortunate death, he had been representing the victim, Hall? Saunders silence about Hall through the course of trial, appeal, remand, resentencing, another appeal and state post-conviction review simply defies a benign explanation.

D. Mickens Could Not Be Asked to Consent to Saunders' Conflicts of Interest.

A critical circumstance in this case is that throughout the course of the trial and appeal in the state courts, Mickens was unaware of the conflicts that affected Saunders' representation of him. But assuming he *had* known and the trial court had offered him the opportunity to waive the conflicts — instead of simply appointing other, unconflicted counsel — Mickens could not have given the required consent.

First, in order to secure from Mickens effective consent to the conflict, Saunders would have been forced to disclose to Mickens his prior representation of Hall. But that fact, without more, was confidential, not only because all juvenile court records in Virginia are sealed, but also because it was a secret under the ethics code and, therefore, non-disclosable. *See* VA. CODE OF PROF'L RESPONSIBILITY DR 4-101 (Michie 1992). When a lawyer cannot disclose enough information to permit the client to consent after consultation, the result is that the lawyer must simply decline proceeding further. *See* RLGL

§ 122 cmt. c(i) ("if means of adequate disclosure are unavailable, consent to the conflict may not be obtained").

Second, even if Saunders could have disclosed the fact of his representation of Hail, he could not have disclosed the confidential information about the representation necessary to permit Mr. Mickens to make a judgment whether this conflict was one he was willing to waive. In order for a waiver to be effective it must be fully informed, and the court must have been able to warn the defendant both of his right to alternate counsel and of the "potential hazards posed by the conflict of interest." *United States v. Rodriguez*, 929 F.2d 747, 750 (1st Cir. 1991). Courts must invalidate waivers when they are secured based on misrepresentations or inadequate disclosure of the potential consequences. *See, e.g., State v. Johnson*, 823 P.2d 484 (Utah Ct. App. 1991).

Third, the standard test to determine if a conflict is non-waiveable is whether a "disinterested lawyer would conclude that the client should not agree to the representation under the circumstances." MODEL RULES 1.7 cmt. 5; *see also Burger v. Kemp*, 483 U.S. 776, 810-11 (1987) (Blackmun, J. dissenting). If so, "the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." *Kelley's Case*, 627 A.2d 597, 600 (N.H. 1993).

The non-waiveability of this conflict is best demonstrated by considering what conversation would have been required between Saunders and Mickens had a waiver been sought. Saunders would have been forced to explain to Mickens — whose life was literally on the line — that he, Saunders, was perfectly happy to represent Mickens, but Mickens would have to understand that, in undertaking the representation, Saunders would not be able to conduct a full pre-trial investigation into the character and conduct of Hall, that Mickens would not be able to put the victim on trial at all and that Saunders would be barred from challenging any characterization of Hall as other than a person worthy of the jury's highest sympathies. Moreover, Saunders would have to tell Mickens that he could not inform him the reason for the limitations he was imposing on the representation. No reasonable lawyer, in good conscience, could ask a client to accept these restrictions when any other lawyer assigned to the case could proceed unfettered. Moreover, no client could give informed consent to the request and no court could have accepted it.

III. REQUIRING MICKENS TO SHOW THE CONFLICTS OF INTEREST ALSO HAD AN ADVERSE EFFECT WOULD BE IN DIRECT CONFLICT WITH THE TREATMENT OF CONFLICTS OF INTEREST UNDER GENERALLY ACCEPTED PRINCIPLES OF LEGAL ETHICS.

The court below holds, in substance, that an actual conflict unknown and necessarily unconsented to by the defendant — and unnoticed by the court responsible for creating the conflict — is of no legal consequence unless the defendant can prove that the conflict in fact injured his lawyer's representation of him. Under generally accepted ethics principles, on the other hand, in the absence of disclosure and the client's informed consent, "a lawyer *may not* represent a client if the representation would involve a conflict of interest." RLGL § 121 (emphasis supplied); *see also* MODEL RULES 1.7. ("A lawyer *shall not* represent a client if the representation of that client may be materially limited by the lawyer's [undisclosed] responsibilities to another client or to a third party." (emphasis supplied)). Surely these latter principles, for the reasons set forth below, provide the sounder rule for ensuring that clients receive the level of loyalty to which they are entitled.

A. REQUIRING AN ADVERSE EFFECT ANALYSIS IS COUNTER-PRODUCTIVE BECAUSE IT COMPROMISES A CLIENT'S TRUST.

Client confidence is repeatedly cited as a central reason for a strict prohibition of conflicts of interest and that principle has constitutional implications. Instilling confidence is an objective important in itself because "mutual trust" is "necessary for effective representation," *State v. Jones*, 923 P.2d 560, 566 (Mont. 1996), for "[i]t is essential to our adversary system that a client's ability to communicate freely and in confidence with his counsel be maintained inviolate." *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977). A client's

distrust of his lawyer may become so severe that it alone may render the lawyer incapable of providing constitutionally adequate representation. *See Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970); *Romero v. Furlong*, 215 F.3d 1107 (10th Cir. 2000).

The ethical principle that bars a lawyer from engaging in a representation when the lawyer's undisclosed interests put the client at risk "seeks to assure clients that their lawyers will represent them with undivided loyalty," RLGL § 121 cmt. b. The assurance provided by the rules of ethics is intended "[t]o promote confidence between the accused and his attorney," *Zarychta v. State*, No. 14-99-00145 CR, 2001 Tex. App. LEXIS 1752, at *4 (Tex. Ct. App. Mar. 15, 2001).

A constitutional rule entitling defendants to representation free from undisclosed conflicts tends to bolster client confidence — a goal this Court has endorsed, *see Strickland v. Washington*, 466 U.S. 668, 690 (1984) — by giving defendants greater assurance that their lawyers have made full disclosure. A rule such as that contemplated by the *en banc* majority of the Court of Appeals — which puts the burden on a betrayed client to prove that the betrayal actually did him harm, and leaving unremedied conflicts of interest whose harm, though real, cannot be proved — can hardly be conducive to client trust.

By recognizing a right against covert conflicted representation, the state assures the defendant that it is "[his constitutional] prerogative . . . rather than [the prerogative of] his [conflicted] counsel to decide whether he [will] accept the risk that counsel's trial strategy [will be] devised not in his interest, but in the interest of [another]." *McDonald*, 496 N.E.2d at 849. As between the rule embraced by the *en banc* majority below and one recognizing a constitutional right to counsel free from undisclosed conflicts, the latter creates optimal conditions for the "mutual trust [that is] necessary to effective representation," *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977).

B. Undisclosed Conflicts of Interest Systematically Create an Impoverished Record That Renders the Adverse Effect Analysis Useless.

If the decision at the *en banc* court below, requiring a showing of adverse effect even for undisclosed conflicts, is to be enshrined in Sixth Amendment jurisprudence, there will be an undeterminable number of injured defendants whose representation is adversely affected by counsel's conflict, but who are unable to *prove* that effect, and who in consequence are unable to secure a Sixth Amendment remedy. This approach contrasts sharply with the approach followed by other lower courts and by applicable rules of professional responsibility, that a defendant has a right to a lawyer who is untainted by undisclosed risk-imposing conflicts of interest.

A breach of loyalty may be apparent, but this Court and the lower courts have repeatedly recognized that the effects of a breach are not: "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692. Other courts agree, observing that when a defense lawyer has a conflict of interest, "the prejudice may be subtle, even unconscious." *Castillo*, 504 F.2d 1245. Because a cold record cannot be expected to disclose "the erosion of zeal which may ensue from divided loyalty," *id.*, the *Castillo* Court refused to require that the defendant identify specific instances in which his lawyer's conflicting loyalties adversely affected his representation.

Numerous lower courts have concurred in this view.[6] Once a defendant has shown that his defense counsel had undisclosed interests that created a substantial risk of undermining the representation, and that the trial court failed to inquire into the manifest potential conflict, the better-reasoned lower court decisions have concluded that "[i]t is unfair to the accused, for who can determine whether his representation was affected, at least, subliminally, by the conflict." *People v. Stoval*, 239 N.E.2d 441, 444 (Ill. 1968);[7] *cf. Glasser v. United States*, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").

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6. *See, e.g., United States v. Rogers*, 209 F.3d 139, 146 (2d Cir. 2000) ("[T]he sorting out of the conflict issues after trial entails findings that, even if they are sound enough to be sustained, represent intuitions about why some steps were taken and others forgone, and the impact of what happened. Inevitably, the post-trial inquiry opens avenues for undetected conflicts and constitutional harms that could be foreclosed at the outset by an informed waiver or a substitution of counsel."); *United States v. Malpiedi*, 62 F.3d 465, 470 (2d Cir. 1995) ("[A]fter-the-fact testimony by a lawyer who was precluded by a conflict of interest from pursuing a strategy or tactic is not helpful. Even the most candid persons may be able to convince themselves that they actually would not have used that strategy or tactic anyway, when the alternative is a confession of ineffective assistance resulting from ethical limitations."); *State v. Watson*, 620 N.W.2d 233, 236 (Iowa 2000) ("A cold, dispassionate appellate transcript simply cannot provide an adequate basis for assessing [defense counsel's] performance, for subtle variations in demeanor and depth of cross-examination cannot be reflected in the pages of a transcript.") (quoting *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir. 1979)); *In re Richardson*, 675 P.2d 209, 214 (Wash. 1983) ("[T]o assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation."); *State v. Aguilar*, 536 P.2d 263, 264 (N.M. Ct. App. 1975) (quoting *Castillo*).

7. In declining to require that defendants demonstrate an adverse effect in addition to an undisclosed conflict, some courts go beyond evidentiary concerns; they suggest that, at least where a trial court has failed to inquire, there can be no harmless conflict. *See, e.g., U.S. v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995) ("Counsel's inability to make . . . a conflict-free decision is itself a lapse in representation.").

In Young v. United States, 481 U.S. 787 (1987), and *Wheat v. United States*, 486 U.S. 153 (1988), two cases that examine lawyer conflicts from different perspectives, this Court has endorsed disqualification when a trial court finds a conflict without requiring an adverse effect or other impact analysis. *See Young*, 481 U.S. at 812-13; *Wheat*, 486 U.S. at 164. In both cases, the Court found that the pervasive and insidious nature of conflicts made an adverse impact analysis impractical or impossible. In *Young*, this Court observed:

> Appointment of an interested prosecutor is also an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are part of the record.

Young, 481 U.S. at 812-13. The *Young* Court was unwilling to apply either a harmless error analysis or to require proof of actual prejudice in the case of a non-disinterested prosecutor. [8]

In *Wheat*, the Court weighed the conflicting Sixth Amendment interests of conflict free counsel and a defendant's right to counsel of his choice. 486 U.S. at 159. This Court found that the trial court had not abused its discretion by declining Wheat's waiver of his lawyer's conflict. *Id.* at 164.

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8. It is not beside the point to note the irony that under the learning in *Young*, Saunders, as Hall's lawyer, could never have been appointed a special prosecutor of Mickens. If that is so then, a fortiori, Saunders should not be able to represent Mickens. At least in the former case Saunders would have been on the same side of the matter, if you will, pressing charges against a person who allegedly victimized his client. His sympathies would naturally be with the prosecution and, indeed, it is concern about how strong those sympathies might be that would lead to the disqualification of the lawyer for the vicitm. But to ask that same lawyer, in effect, to switch sides is likely to have an even more unfortunate effect on the integrity of the representation than that which animated the Court in *Young*.

In contrast to the present case, the *Wheat* Court was balancing two important Sixth Amendment rights. Nevertheless, it concluded that proof of a mere potential conflict could demand disqualification. The present circumstances are all the more compelling.

The injurious effects of a lawyer's external interests tend to defy detection and measurement; only by prohibiting the nonconsensual imposition on a client of a substantial risk of those effects can courts weed out unconstitutional convictions.

C. Even if the Approach to Conflicts of Interest Embodied in the Law Governing Lawyers Is Not Applied More Generally in Ineffective Assistance Cases, It Is Clearly Appropriate In the Particular Circumstances of This Case.

Any conclusion about the proper remedial approach to a conflict of interest in any event should not place any burden to prove adverse effect on a client who endured an undisclosed conflict. When a conflict is disclosed — for example when the client objected but relief was denied — the client is at least on notice of the facts that gave rise to the request for different counsel, will view his lawyer's conduct through that prism, fully aware of the potential burden under which the lawyer is operating, and can document for later use those decisions and actions that the client believes may have been infected by the conflict. So, too, a court that either denied disqualification or knows of the denial can be alert to how the affected lawyer handles the defense and will retain the right of disqualification. While such opportunities are hardly a substitute for a correct initial decision on whether a lawyer should have been disqualified, they do highlight a major difference between cases in which the conflict was disclosed and ones in which it was not.

Where the conflict is hidden, the client assumes that he or she is receiving representation predicated on undivided loyalty. The client perceives a relationship characterized by trust and confidence. As a result the client will have no reason to be alert to possible problems. When the conflict of interest is

finally disclosed, any attempt to reconstruct the effects of the conflicted representation will be impaired dramatically by the false sense of security induced by the non-disclosure.

Thus, the undisclosed conflicts case is even worse than the situation brought to the Court in *Holloway v. Arkansas*, 435 U.S. 475 (1978). In both situations, the conflict of interest produces an impoverished record, but in the undisclosed conflict situation, the defendant is helpless to mitigate the effect. It follows that placing the burden of proving adverse effect on Mickens subjects him to a harsher standard, even though he is in a more vulnerable position.

IV. Even if the Court Concludes That an Adverse Effect Analysis Is Required, the Court Should Still Grant Reflief Because the *En Banc* Opinion Is Fundamentally Flawed.

The *en banc* majority assumes arguendo that Saunders was burdened by an actual conflict, but then concludes that it is of no moment because Mickens was unable to establish an adverse effect. *See Mickens v. Taylor*, 240 F.3d 348, 358 (4th Cir. 2001) (*en banc*). The court concluded there was no adverse effect because the information Saunders knew was irrelevant to Mickens' defense, which was based on the assertion that Mickens was not the perpetrator. *See id.* at 361.

This proposition, however, cannot be used to analyze the propriety of Saunders' conduct because it is, itself, tainted with the conflict. Once it is assumed that Saunders was burdened with the conflict, it also must be assumed that every decision made by Saunders is suspect and cannot be trusted.[9] That includes the defense strategy itself.

First, a lawyer, unaffected by the conflict of interest, would certainly have considered with his client trying a different defense. Indeed, it is a lawyer's obligation to explore all the alternatives. This is especially true when the result of a bad judgment is not a client paying money she does not owe

9. This obviousness of the adverse effect in the instant litgation is all the more surprising because of the systematic tendency of a conflict of interest to hide and de-emphasize the effect. *See supra*, pp. 18-21.

or serving a prison sentence for a crime he did not commit, but a sentence of death.

Second, even if a client, guided by a lawyer, chooses the "I didn't do it" defense, he still must be free to challenge the prosecution's case for failure to prove the alleged crimes beyond a reasonable doubt. Here, this would include introducing evidence about the victim at the guilt phase of the case — for example, to demonstrate that the perpetrator may have been acting in self-defense, given Hall's propensity for violence and known possession of weapons, or that this was not a capital crime because the alleged sodomy itself was consensual, and therefore, whoever perpetrated the crime would not be eligible for the death penalty.

Even if all of the foregoing had left the defense taking the same approach Saunders in fact took at the guilt phase of the proceeding, it does not follow that the information about Hall would not have been critical to the penalty phase. On this point the *en banc* majority asserts that none of the information would have been relevant because the approach taken was sympathy for the victim's family. *See Mickens*, 240 F.3d at 362. But that was the approach chosen by a lawyer who had no choice because of his conflict and by a client who did know he had a choice. If the prosecution was going to be free to offer Hall's mother's testimony to explain her grief at losing her son to help the jury see its way clear to sending Mickens to his death, then the defense had to be free to conduct the investigation that would prepare it to employ a strategy that asserted that a) she was not credible and b) in any event, whether or not Hall's mother testified, the victim was not quite as worthy of the jury's sympathy as the prosecution's presentation would indicate.

Because Saunders labored under a conflict, any adverse effect analysis cannot rest on a facial determination of whether, absent a conflict, Saunders' choices were correct or even reasonable. Rather, an adverse effect analysis must begin with a blank slate and ask the question: did the lawyer make choices in his client's best interest or did the conflict adversely affect those choices? In the present case, Saunders made a series of choices that were based on Saunders' divergent interests and not on what was best for Mickens.

CONCLUSION

> The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case.

Emle Industries v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973).

These quoted words sum up *amici's* argument. It is *amici's* position that while the case of Walter Mickens does not present a close question on the need to grant relief from the conflict of interest he suffered, the way this Court crafts the grant of relief can go a long way toward making the constitutional guarantee of effective assistance of counsel embody the principles of the rules governing the professional responsibility of lawyers. And if that is done, not only will Mickens' injuries be remedied, but also the Court will bolster public confidence in the fairness of our system of justice.

Respectfully submitted,

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